ORIGINAL

Supreme Court
FILED
OCT 19 1999

No. 99-5739

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government concedes that the decisions of the courts of appeals addressing the question presented are, at the very least, in "tension" (U.S. Br. 4) and it does not dispute that the question presented is recurring. The government does not seriously dispute that the limits on constitutional application of Section 844(i) are important. Rather, the government tries to obscure the importance of the Circuits' conflicting conclusions about the application of Section 844(i) to private residences — and the diametrically opposed constitutional analyses engaged in by those courts — by relying, misleadingly, on what it terms "broad general agreement as to the applicable constitutional principles" (*id.* at 11) when actively used *commercial* property is at issue. And the government has nothing to say in response to our demonstration that the Seventh Circuit's reasoning would support a general federal police power despite this Court's contrary holding in *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). Indeed, the government concedes that the petition should not be denied. *Id.* at 4, 12. The only real dispute relevant to the disposition of the petition, then, is whether it should be granted now or later.

The deep division among the courts of appeals warrants immediate and plenary resolution by this Court. The government tries to paper over the square conflict by citing insubstantial factual distinctions. But in claiming that courts generally apply the aggregation analysis used in the decision below, the government simply tries to wish away the entirely different and irreconcilable analysis applied by the courts in conflict with that decision. Indeed, in asserting that there is a majority view on Commerce Clause analysis under other federal criminal statutes, the government — when citing contrary authority (U.S. Br. 7-8 &

nn.3-4) — simply demonstrates that the conflict resolvable by a grant of this petition is mirrored in decisions affecting other statutes and thus is both more real and more important than the government lets on.

There also is no substance to the government's assertion that plenary review should be withheld until the Court decides the consolidated cases of *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29. The government ignores the controlling difference between *Morrison* and this case: there is no jurisdictional element in the statute under review in *Morrison*, but the constitutional analysis applicable to statutes with such elements is the *only* issue here. This case and *Morrison* should be reviewed in tandem.

1. The government admits that the decision of the Seventh Circuit is in "tension" with decisions by other courts of appeals. U.S. Br. 4. But "tension" understates the deep division among the Circuits over the constitutional limits on the application of Section 844(i) to arson of property not actively used in a commercial activity. This conflict in part reflects another: the courts of appeals are also split over whether the analysis of substantial effects articulated by this Court in *Lopez* applies to statutes with an express jurisdictional element. Pet. 8-11. This Court should grant review to resolve these important and related conflicts.

The courts in *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996), refused to apply Section 844(i) to arson of residential properties with only minimal and attenuated links to interstate commerce, and declined to apply the sweeping aggregation

analysis endorsed by the government and relied on by the Seventh Circuit. The government nonetheless asserts (U.S. Br. 4) that "no square conflict exists."

Certainly the Seventh Circuit labored under no such illusions. That court recognized that its decision conflicted with *Denalli* and *Pappadopoulos* notwithstanding minor factual differences in the cases, but explicitly disagreed with those decisions. Pet. App. 3a. Other courts of appeals have acknowledged the same circuit split. See, *e.g.*, *United States* v. *McGuire*, 178 F.3d 203, 210 (3d Cir. 1999); *United States* v. *Latouf*, 132 F.3d 320, 326 (6th Cir. 1997), cert. denied, 118 S. Ct. 1542 (1998).

The government claims to know better than the courts embroiled in the conflict. "In *Pappadopoulos*," the government asserts, "the only commerce nexus was the receipt of interstate natural gas, while in this case the court of appeals relied in addition on the out-of-state mortgage and insurance policy." U.S. Br. 10. The government does not explain why this distinction should make a difference. If a single *de minimis* link to interstate commerce standing alone would not bring the application of Section 844(i) into compliance with the Commerce Clause, three such insubstantial links should fare no better. Zero plus zero plus zero is still zero.

In any event, the Seventh Circuit made clear that the receipt of natural gas, standing alone, would suffice in that Circuit. The court of appeals affirmed (Pet App. 2a) the continuing vitality, after *Lopez*, of its earlier decision in *United States* v. *Stillwell*, 900 F.2d 1104 (7th Cir. 1990). In *Stillwell*, as in *Pappadopoulos*, the only connection to interstate commerce

was the provision of natural gas from out-of-state sources to the private residence. See *id.* at 1106. The square conflict with *Pappadopoulos* is both acknowledged and undeniable.

Likewise, the evidence in *Denalli* — that the owner periodically used his home computer in working for an company engaged in interstate commerce — established a stronger and more direct connection between interstate commerce and residential property than the Seventh Circuit deemed sufficient for constitutional application of the statute. Indeed, it exceeded the evidence in this case, as the intermittent "use" of the computer at least arguably came within the terms of the jurisdictional element of Section 844(i), which is more than can be said for the passive connections relied upon by the Seventh Circuit. Certainly there is no doubt that the conviction in *Denalli* would have been upheld in the Seventh Circuit, while the passive connections to commerce in this case would have fallen short of the requirements imposed by the Eleventh Circuit.[1]

The government also is off-base in suggesting (U.S. Br. 7, 11) that the courts of appeals are not divided over the application to Section 844(i) of the substantial effects analysis set out in *Lopez*. As the petition explained, two circuits have held that *Lopez* is wholly inapplicable to Section 844(i) because it contains an express jurisdictional element,

[1] The government implies that the Eleventh Circuit has receded from *Denalli*. U.S. Br. 11 n.6 (quoting *Belflower* v. *United States*, 129 F.3d 1459, 1461-1462 & n.4 (11th Cir. 1997)). To the contrary, the Eleventh Circuit has repeatedly recognized that *Denalli* bars application of Section 844(i) to arson of private, owner-occupied residences. See *United States* v. *Dascenzo*, 152 F.3d 1300, 1303 (11th Cir. 1998); *United States* v. *Viscome*, 144 F.3d 1365, 1368 (11th Cir.), cert. denied, 119 S. Ct. 362 (1998)); *Belflower*, 129 F.3d at 1461-1462 n.4; *United States* v. *Chisholm*, 105 F.3d 1357, 1357-1358 & n.2 (11th Cir. 1997).

and thus the government need show only a *de minimis* connection to interstate commerce. Pet. 10 (discussing *United States* v. *Rea*, 169 F.3d 1111, 1113 (8th Cir.), petition for cert. filed, No. 99-6136 (Jul. 14, 1999), and *United States* v. *Tocco*, 135 F.3d 116, 123-124 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998)). Four circuits have held that *Lopez* applies to Section 844(i) notwithstanding the statute's express jurisdictional requirement, and requires that the interstate commerce connection satisfy some variation of the substantial effects analysis. See Pet. App. 2a-3a; Pet. 10 (discussing *Pappadopoulos*, *Denalli*, and *Latouf*, 132 F.3d at 325-327). Even the latter courts disagree on the scope of the inquiry, particularly on the use of the aggregation analysis used below. If this is "broad general agreement," as the government contends (see U.S. Br. 11), it is difficult to imagine what would constitute conflict.[2]

2. The government tries to postpone this Court's review based on the grants of certiorari in *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29. See U.S. Br. 4-5, 10. The government makes no effort to show how *Morrison* would affect resolution of this case, beyond an unexplained contention that a decision in *Morrison* might

[2] The government also cites numerous cases involving rental and other commercial property for the proposition that the lower courts are in general agreement about the proper application of Section 844(i). U.S. Br. 7-8 n.3. But the issue presented in this case is not whether Section 844(i) applies to property in active commercial use — a question that this Court answered in *United States* v. *Russell*, 471 U.S. 858 (1985), suggesting the constitutionality of that application as well — but whether the Commerce Clause permits it to be applied to property that is not rented or used commercially, based solely on *de minimis* and indirect connections to interstate commerce.

"clarify the extent to which federal regulation of violent private conduct may be based upon the anticipated effects of such conduct on the national economy." *Id.* at 11.

The government's failure to explain exactly how *Morrison* might affect the disposition of this case is unsurprising. *Morrison* focuses on Congress's power, after *Lopez*, to proscribe certain non-commercial activity in the Violence Against Women Act (VAWA) without including an express jurisdictional element in the statute. This case, by contrast, focuses entirely on the constitutional limits on the application of precisely the type of jurisdictional element that is absent from the VAWA. Thus, *Morrison* does not raise the key issue presented here: whether and how the constitutional limitations articulated in *Lopez* apply to a statute that contains an express jurisdictional element.

The government must be aware of that controlling distinction. Its petition in *Morrison* pointed out that the Fourth Circuit's *en banc* decision in that case expressly relied on the absence of a jurisdictional element as a basis for finding the VAWA unconstitutional. See *Morrison* Pet. 14, No. 99-5.

Indeed, the government has repeatedly claimed that the presence of an express jurisdictional element in a statute, as in this case, renders *Lopez* inapplicable. See, *e.g.*, *Viscome*, 144 F.3d at 1369 n.9; *United States* v. *Bishop*, 66 F.3d 569, 585 (3d Cir. 1995). The government undoubtedly will try to avoid aspects of this Court's decision in *Morrison* on the ground that statutes containing express jurisdictional elements are subject to a far more forgiving constitutional analysis, just as it has done with *Lopez*.

Morrison provides no reason to deny plenary review in this case. The issues in *Morrison* and those in this case are complementary, not overlapping. By granting plenary review now, the Court could consider at one swoop the application of the substantial effects test to federal regulation of non-economic activity with or without reliance on jurisdictional elements. To delay review of this case would permit the government (and some lower courts) to continue to disregard the limits on the exercise of the commerce power.

3. The government also argues that the decision below was correct. That argument at most could reinforce the need to resolve the conflict among the Circuits, but the government is wrong in any event.

The government asserts (U.S. Br. 5-6) that this Court's decisions in *Lopez* and *United States* v. *Russell*, 471 U.S. 858 (1985), permit application of Section 844(i) to arson of property that is not actively used for a commercial purpose. So long as the individual arson has a *de minimis* connection to interstate commerce and the total economic effect of residential arsons is substantial, the government contends, Section 844(i) may be constitutionally applied.

That argument proceeds as if *Lopez* did not exist. The government relies on aggregating the effects of all residential arsons on interstate commerce to conclude that there is a sufficient basis for federal regulation under the commerce power. But the federal arson statute does not qualify for such constitutional sleight-of-hand. Section 844(i) is not "a general regulatory statute" that "bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558 (internal quotation marks omitted). And arson neither "arise[s] out of" nor is

"connected with a commercial transaction" of any kind. *Id.* at 561. Aggregation is impermissible here.

Moreover, the government's sweeping approach would cancel the winnowing effect of the very jurisdictional element that alone can render Section 844(i) facially constitutional. As this Court has explained, jurisdictional elements must establish sufficiently substantial connections with commerce through "case-by-case inquiry." *Lopez*, 514 U.S. at 561-562. The government's position not only makes that inquiry virtually meaningless, but disregards the plain meaning of "use" in Section 844(i), a meaning that requires active employment.[3] See Pet. 19. Nothing in *Russell* or *Lopez* supports the government's gloss that reduces "use" to a vague invocation of any indirect and attenuated connection to interstate commerce — any "discernible effect," in the government's words (U.S. Br. 6). The government's view would permit the needed connection to commerce to consist of something not identified in the statute's jurisdictional element. But that would nullify the winnowing function of the

[3] The government suggests that petitioner has waived the argument that the property here was not "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the statute. See U.S. Br. 7 n.2. Not only is that issue intrinsic to the constitutional issue, which was plainly presented in the court of appeals (Pet. C.A. Br. 3), but in pressing that issue petitioner contended that "[i]n the present case there was (and can be) no claim that the affected structure was *used* other than for private-residential purposes" (*id.* at 12) (emphasis added). Where the constitutionality of a statute's application rests on the inclusion of an express jurisdictional element, satisfaction of that jurisdictional element is a prerequisite to a finding of constitutionality. In order to determine whether the statute could be constitutionally applied here, the court of appeals necessarily passed on the question whether the statute applied at all — as this Court would have to do.

jurisdictional element (see *Lopez*, 514 U.S. at 561-562), particularly when effects may be "discern[ed]" so subtly as the government suggests.

As we explained (Pet. 12-15), arson is not an "economic" activity, and to treat it as such would mean that virtually any property crime would fall within the commerce power. Similarly, to construe the commerce power to permit federal regulation of any conduct that has significant economic costs in the aggregate would justify federal regulation of almost any crime. Indeed, the government's analysis would permit Congress to enact nationwide zoning laws, or to make window-breaking a federal crime, based on a jurisdictional element that had no meaningfully limiting effect. This result cannot be reconciled with this Court's clear holding that Congress lacks a "plenary police power." See *Lopez*, 514 U.S. at 566. The government does not grapple with these necessary consequences of its position. But those consequences, which are apparent from Seventh Circuit's decision as well, reinforce the need for prompt further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 19th day of October, 1999, one copy of the Reply Brief for the Petitioner in the above-captioned case was served by first-class mail, postage prepaid, on the following counsel for the United States of America:

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I further certify that all parties required to be served have been served.

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The Honorable William K. Suter
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Supreme Court of the United States
Washington, D.C. 20543

Re: *Dewey J. Jones* v. *United States of America*, No. 99-5739

Dear Mr. Suter:

I am enclosing for filing one original and ten copies of a Reply Brief for the Petitioner in the above-captioned case. Please date stamp the extra copy and return it to the messenger.

Thank you for your consideration of this matter.

Very truly yours,

Sharon Swingle

Enclosures
cc: All Counsel

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